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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1959.

No. .....

THOMAS D. CLANCY and DONALD KASTNER,
Petitioners,

vs.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals for the Seventh Circuit.

Petitioners pray that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in the above entitled cause on March 24, 1960.

OPINION BELOW.

The opinion of the Court of Appeals has not as yet been reported and is printed in the Appendix B, infra, pp. 23-54.

JURISDICTION.

The judgment of the Court of Appeals was entered on March 24, 1960 and is reprinted in the Appendix B, to this petition at page 55. A timely petition for rehearing was filed by Petitioners and this petition was denied on April 14, 1960. The jurisdiction of this court is invoked under 28 U. S. C. A., Sec. 1254 (1).

QUESTIONS PRESENTED.

I. Whether books and records kept by Petitioners in their business of accepting wagers on horse races (where they have prepared and filed with the District Director of Internal Revenue the special tax return and application for registry; paid the special $50.00 tax; and, received their wagering stamp), are protected by the Fourth and Fifth Amendments to the Constitution of the United States from search and seizure for the purpose of being used in a criminal trial against them, on the grounds that said books and records are merely evidence of an offense as opposed to being property designed, or intended for use, or which is, or has been used as the **means** of committing a criminal offense as set forth in Federal Rules of Criminal Procedure 41 (b).

II. Whether private books and records, which necessarily must be maintained in an orderly conduct of a wagering business, lose their status as private books and records so as to be seized and used in evidence in a criminal case, notwithstanding the Fourth and Fifth Amendments to the

Constitution of the United States, because Title 26, U. S. C., Sections 4403, 4423, and 6001, and, U. S. Treasury Regulations 325.32 require books and records to be kept reflecting transactions carried on in the course of a taxable wagering business.

III. Whether after a government agent has testified for the government, the government is required to produce the statements, memoranda or reports of the government agent, which he, himself, has made relevant to the subject matter of his testimony, upon the demand of the defendants' attorney, prior to cross-examination of the government agent pursuant to Title 18, U. S. C., Sec. 3500 (The Jencks Act).

STATUTES AND RULE INVOLVED.

Title 18, U. S. C., Section 3500 (a), (b), (c) (App. A., p. 19).

Title 26, U. S. C., Section 4403 (App. p. 20).

Title 26, U. S. C., Section 4423 (App. A., p. 20).

Title 26, U. S. C., Section 6001 (App. A., p. 20).

Title 26, U. S. C., Section 7605 (b) (App. A., p. 21).

U. S. Treasury Regulations 325.32 (a), (b) (App. A., p. 22).

Federal Rules of Criminal Procedure 41 (b) (App. A., p. 21).

AMENDMENTS TO CONSTITUTION OF UNITED STATES.

Amendment IV (App. A., p. 22).

Amendment V (App. A., p. 22).

STATEMENT.

On May 6, 1957, and for four years prior thereto, the Petitioners were engaged in the business of accepting wagers on horse races. Each year they were so engaged, the Petitioners had prepared and filed with the District Director of Internal Revenue at Springfield, Illinois a special tax return and application for registry-wagering Form 11-C; paid the $50.00 special tax; and, received their wagering stamp. For each month during these years, the Petitioners filed monthly reports of wagers accepted by them and paid the tax on the wagers reported.

On May 6, 1957, Internal Revenue Agents went to the premises known as 2300a State Street, at which place the Petitioners were conducting a wagering business, and made a search of the premises. At the time of the raid, Petitioner Kastner was present and he informed the Internal Revenue Agents that the wagering business was being conducted by the North Sales Company, which had been issued a special wagering stamp for the year 1956-1957. Although no arrests were made on the premises the Internal Revenue Agents nonetheless seized the books and records of the Petitioners maintained by them in the operation of their wagering business, which consisted of the following: a daily recap of the bets received by Petitioners for the month of March, 1957 (Government's Exhibits 54 through 79; Appellants' App. 89-90); recapitulation of all bets received by the North Sales Company for the month of April, 1957, and to and including May 4, 1957 (Government's Exhibits 80 through 109; Appellants' App. 90-91); a recapitulation of the profits of the North Sales Company (Government's Exhibit 110; Appellants' App. 91); a racing form wrapped around a record of wagers received by the North Sales Company for a particular day (Government's Exhibits 111A to 111RRR; Appellants'

App. 127-128); twenty-eight racing forms with contents similar to those in Government's Exhibit 111, and which forms were contained in a box marked as Government's Exhibit 112; also, paid telephone bills, and cash.

It was stipulated by the Government (Appellants' App. 41-42) that the records so seized or information obtained from said records were subsequently presented to a Grand Jury for the Eastern District of Illinois, which returned an Indictment against the Petitioners charging them with violations of Sec. 1001, Title 18 (making false statements to Internal Revenue Agents); Sec. 7201 of Title 26 (attempting to evade the payment of the 10% wagering tax); and, Sec. 371 of Title 18 (conspiring to evade the payment of the 10% wagering tax) (Appellants' App. 24-32).

Petitioners filed motions for the return of property and to suppress evidence on the ground, among others, that the property seized were the private books and records of the Petitioners and protected by the Fourth and Fifth Amendments to the Constitution of the United States (Appellants' App. 36-40). These motions were denied. During the trial, these records were admitted into evidence over the objections of the Petitioners on the ground, among others, that these were private books and papers and protected by the Fourth and Fifth Amendments. Objections were overruled and these records formed a basis for the calculations of Internal Revenue Agent Martin Mochel as to the tax allegedly evaded by these Petitioners (Appellants' App. 144-148), and were introduced by the Government to prove the correct amount of wagering tax due by the Petitioners.

In affirming the conviction in the trial court, the court below held that the books and records of the Petitioners were not protected against search and seizure under the provisions of the Fourth and Fifth Amendments because:

(A) They were "a part of the outfit or equipment actually used to commit an offense" (App. p. 41); and

(B) They came within the "required records exception" because the records concerning the operation of the wagering business were required to be kept by law, and were, therefore, not "private papers" (App. pp. 41-42).

During the trial, government agents, Ira L. Minton (Appellants' App. 96-99), Wilbur Buescher (Appellants' App. 99-104), Frank Hudak (Appellants' App. 104-108), Norman Mueller (Appellants' App. 109-111), and Martin O. Mochel (Appellants' App. 142-150), testified on behalf of the government. After the conclusion of the testimony on direct examination, a demand was made by the defense for any statements and reports which related to the subject matter of the testimony of the witnesses Ira L. Minton (Appellants' App. 97-99); Wilbur Buescher (Appellants' App. 101-102); Frank Hudak (Appellants' App. 106-107); and Norman Mueller (Appellants' App. 110-111). The trial judge refused to order the government to produce the statements or memoranda either made by them or adopted by them, unless the statements and memoranda were made contemporaneously with the transaction they reported. The court below (App. 48-49) held that ordering the production of statements was discretionary with the court and then further held that the reports and memoranda demanded were not statements within the meaning of the statute, Title 18, Sec. 3500 (e).

Each Government Agent who was a witness testified that the memorandum or report prepared by him pertained to the subject matter of his testimony on the stand, and that he was present at the interviews or occurrence, which was the subject matter of his report. The court below held that the trial court had committed no abuse of discretion

in refusing to require the production of the memoranda prepared by the witnesses after the interviews had been completed "particularly since parts of the memoranda were based upon the notes and interpretations of other agents". This statement of the court below could have only referred to the report prepared jointly by Internal Revenue Agents Buescher and Mochel, and Agent Buescher testified that he was present with Mochel at the time of the interview; sat to the left of Mochel who made the notes; agreed with the notes made by Mochel; and that they went to the Internal Revenue Office after the interview and prepared a memorandum of the interview which Buescher signed (Appellants' App. 99-102).

Although the court below affirmed the trial court, Justice Schnackenberg in a concurring opinion stated:

> "The failure of the trial judge to require the production by the government of the memoranda prepared by certain government witnesses presents a difficult question on this appeal. However, I am not convinced that Judge Steckler's holding on that subject is wrong.
>
> "The language in the cases which he cites lends considerable support to his conclusion" (App. p. 54).

REASONS FOR GRANTING THE WRIT.

1. It is respectfully submitted that the decision of the court below is patently erroneous and misstates a fundamental concept concerning the protection of the Fourth and Fifth Amendments to the private books and records of an individual as clearly stated by this court in **Boyd v. U. S.**, 116 U. S. 616.

This case is of very great importance because the Court of Appeals, by its decision in this case, authorizes the sei-

zure of private books and records of a taxpayer engaged in a business, legal under Federal law, for use as evidence in a criminal prosecution, if said books would prove that the taxpayer had attempted to evade the payment of any tax imposed by the Internal Revenue laws, on the ground that the books and records were the instrumentalities for the commission of a crime. This principle could be applied to every case in which the private books and records of a taxpayer were seized, and used in evidence against him, to prove that he had attempted to evade the payment of any Federal tax. Therefore, the issuance of a Writ of Certiorari is important to all persons who are engaged in business in the United States, and who pay a tax of any kind on transactions which are reflected by their books and records, because this problem could arise in all tax cases, and the decision in this case has great importance to the public as a whole.

The court below in its opinion cited two reasons why the protection of the Fourth and Fifth Amendments were not available to these Petitioners. In the first instance, they said that the books and records of the Petitioners had been used by them to conduct the wagering business, and, therefore, constituted "part of the outfit or equipment used to commit an offense"; and, secondly, they held that since the Petitioners were required to keep books and records reflecting the amount of wagers received by them, that these records then lost their status as private books and records and became public records.

The Petitioners are admittedly gamblers: They have already pointed out that at the time their books and records were seized on May 6, 1957, that they had filed their application for registry-wagering; paid the special $50.00 tax due; received a wagering stamp; and had filed monthly reports of wagers and had paid the 10% tax reported to be due thereon (Appendix p. 40). Under these circum-

stances, it is clear that the Petitioners committed no federal crime by engaging in the wagering business.

Congress has not prohibited or regulated the wagering business. Indeed, the "statute was passed and its constitutionality was upheld, as a revenue measure".[1] The record keeping requirements are solely for the purpose of implementing the processes of the collection of the tax so imposed. Consequently, since the books and records of the Petitioners were used by them to conduct a wagering business, they were, it is admitted, instrumentalities for conducting said business. However, the Petitioners were not prosecuted and convicted of engaging in the wagering business. They were indicted and convicted of attempting to evade and defeat the payment of the wagering tax (i. e., a 10% tax due on wagers accepted by them). Therefore, if the Petitioners did not report the correct amount of wagers accepted by them or pay the correct amount of tax on these wagers, the instrumentalities for the commission of that crime would be the monthly returns filed by the Petitioners which supplied allegedly false information. Thus, this case falls within the principle enunciated by the case of **Takahashi v. U. S.**, 143 F. 2d 118, as to what papers constituted the instrumentalities for the commission of the offense of making false statements to the government. Therefore, the private books and records of these Petitioners were not the instrumentalities for the commission of a crime of attempting to evade the payment of wagering taxes. In fact, the Government introduced the private books and records of these Petitioners to prove the amount of wagering tax allegedly owed by them.

An examination of the decisions of this court fails to reveal any authority for seizing the private books and

[1] United States v. Calamaro, 354 U. S. 351, 358.

records of a taxpayer who is engaged in business which the United States Government does not prohibit. The only authority from the decisions of this court which authorizes the seizure of books and records as instrumentalities for the commission of a crime are those decisions which authorize the seizure of books and records of an individual engaged in a business which the Federal Government prohibited. These cases involve violations of the National Prohibition Act,[2] the smuggling of taxable items into this country,[3] operation of a narcotics business or operation of a counterfeiting business. The court authorized the seizure of the books and records of these businesses on the ground that it is unlawful to possess liquor, narcotics, smuggled goods and counterfeit, and that, therefore, the possession of these items was unlawful and constituted contraband, and the books and records of said businesses were treated the same as contraband. Thus, the court below in effect held that the books and records of the Petitioners were contraband, which is obviously not true, since they had engaged in the wagering business with the full knowledge and consent of the Federal Government which had issued them a wagering stamp for that purpose.

Thus, from what has been stated above, this case raises an important search and seizure question. The Court of Appeals has interpreted the following language of Rule 41 (b) of the Federal Rules of Criminal Procedure to permit the seizure of the books and records of the Petitioners in this cause, to-wit:

> "(b) Grounds for issuance. A warrant may be issued under this rule to search for and seize any prop-

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[2] U. S. v. Lefkowitz, 285 U. S. 452; Marron v. U. S., 275 U. S. 192.

[3] Landau v. U. S., 82 F. 2d 285.

erty. . . . 2. designed or intended for use or which is or has been used as the **means** of committing a criminal offense;"

The court below in its Opinion (Appendix 41) held that the books and records of the petitioners were "a part of the outfit or equipment actually used to commit an offense", and on this basis they authorized the seizure of the books and records of the petitioners used by them in operating the wagering business, and seemed to distinguish between evidence of a crime which had been committed or one which was to be committed in the future when the court said "in other words, evidence of crime or malum in futuro". The court seemed to indicate by this language that only evidence of an intent to commit a crime in the future was protected by the Fourth and Fifth Amendments. Petitioners submit that this is obviously an incorrect interpretation since the Amendments were enacted to prevent an individual from giving incriminating testimony against himself of the commission of a crime and this, of course, infers that a crime has in fact been committed.[4] The court below in its narrow construction would allow a defendant to claim the protection of the Fifth Amendment only as to matters of an intention to commit a crime in the future, and would not safeguard him against giving testimony against himself of crimes he had in fact committed in the past.

2. The second important point relied upon by these Petitioners as to why this court should grant a Writ of Certiorari, involves the question as to whether or not the books and records of the defendants in this case come within the "required records exception" (App. 42). Since all persons engaged in a taxable business are required to keep

[4] United States v. Kahriger, 345 U. S. 22.

records for the purpose of determining the correct amount of income tax due, this case then is important to every person who maintains records as to the profit and loss from his business, if said records are required to be kept by any law of the United States. This is so because under the authority of the Court of Appeals in this case every record required to be kept by law is included in the "required records exception" and, therefore, all such private books and records are excluded from the constitutional protection of the Fourth and Fifth Amendments.

As the principal authority for this holding, the Court below relied on **Shapiro v. United States**, 335 U. S. 1. However Petitioners contend that the **Shapiro** case is authority for only one proposition and that is that the books and records required to be kept under the provisions of the Emergency Price Control Act were subject to seizure, and for no other proposition. The holding in that case is certainly not authority for the proposition that any records required to be kept by any law of the United States are subject to search and seizure and production as evidence in a criminal prosecution.

The only purpose for the government requiring that the books and records be kept by a person engaged in a wagering business was to determine the correct amount of tax due, and not for the purpose of regulation which the government had no right to do. Therefore, the public as a whole had no interest in these records.

This case is similar to an income tax case since the taxpayer, by law, must keep records as to his transactions in order to determine the correct amount of tax due, but it has never been suggested by the Government that the records of every business man are "public records." From the decision of the court below, one may logically reason that all records required to be kept by law are "required

records" and thus not protected by the Fourth and Fifth Amendments of the Constitution, which obviously is not so.

The court below has held (App. p. 41) that since Title 26, U. S. C., Sections 4403 (App. 20), 4423 (App. 20), 6001 (App. 20), and Internal Revenue Regulation 325.32 (App. 22) require records to be kept by Petitioners which are subject to the right of inspection by Government agents that these records are subject to seizure. This is not true and the court said in the recent case of **Abel v. U. S., 80 S. Ct. 683,** at page 695:

> "We have held in this regard that not every item may be seized which is properly inspectable by the Government in the course of a legal search; for example, private papers desired by the government merely for use as evidence may not be seized, no matter how lawful the search which discovers them. **Gouled v. U. S., 255 U. S. 298, 310, 41 S. Ct. 261, 265, 65 L. Ed. 647.**"

Thus the requirement to maintain records and to keep them available for government inspection does not in itself make such records "public records."

3. The decision of the court below in holding that the Petitioners were not entitled on demand after government agents had testified on behalf of the government to have the statements, memoranda or reports of government agents prepared by them relating to the subject matter of their testimony (App. 48-49), finds no valid support in the law and is directly contrary to the decision in three other circuits.

In **U. S. v. O'Connor** (2nd Cir.), 273 F. 2d 358, the district court refused to allow the defendant's reports of government agents who testified as witnesses. In reversing the Appellate Court held:

". . . agent's reports relating to O'Connor's assets, income and expenditures, whether prepared for criminal or civil tax purposes, were necessar to defendant's preparation and conduct of his defense in two respects, to determine whether any statement or fact therein were inconsistent with or contradictory to testimony on the stand of the **makers of the reports.** . . . Point one as to production, so far as it concerns the agent's report, is well taken under the Jencks rule. . . . The so-called Jencks statute, Public Law 85269, September 2, 1957, 71 Statute 595, 18 U. S. C., Sec. 3500, would now require the production on trial in the circumstances of this case."

In **U. S. v. Holmes** (4th Cir.), 271 F. 2d 635, one of the main witnesses for the government was an FBI agent who testified at length about his investigation and about conversations he had with the defendants. Defense demanded the production of the memorandum and reports prepared by the agent during his investigation and recording its results. The District Court ordered the United States Attorney to turn over the pertinent portions of the file, but allowed the District Attorney to determine what was pertinent. The government then on appeal asserted that the Jencks Act did not apply to statements prepared by a government agent who became a witness at the trial—the exact situation we have in the instant case. The Court of Appeals in overruling this contention held:

"The written report of the agent, however, is just as much a verbatim statement of the agent who prepares it, as a written statement of an informer, incorporated in the report, is the statement of the informer. It is a statement within the literal and evident meaning of subsection (e) of the Act. Its use to contradict the agent who prepared it in no way contravenes the policy of the Act against the

use of an investigator's notes or summaries of information to contradict his informer."

In **U. S. v. Prince** (3rd Cir.), 264 F. 2d 850, a government narcotics agent testified, and after his testimony any reports or statements made by him were demanded. One was given, the other was not. The lower court held that there was no resulting prejudice in the failure to make available the relevant portions of the FBI agent's report, but the Appellate Court said in 264 F. 2d at 852:

> "In our view the mandate of the statute, itself, makes the omission substantial. It is not the function of the district court or ourselves to determine whether the appellant was prejudiced by failure to make available the relevant portions of the prior report of the witness. Bergman v. United States (6 Cir.) 1958, 253 F. 2d 933, 935, 936."

The court below cited as its authority to sustain its ruling that the memoranda and reports were not statements within the meaning of the act, **Johnson v. U. S.**, 269 F. 2d 72 (Case actually reverses lower court on other grounds); **Borges v. U. S.**, 270 F. 2d 332; **Papworth v. U. S.**, 256 F. 2d 125. In the Johnson case, supra, it is impossible to determine from the reported decision whether or not the testimony of the FBI agent on the stand was also contained in the statements and reports demanded by the defendants. Apparently, it was not since the court held that this particular memorandum merely contained interpretations and impressions and had no impeachment value. Insofar as it stands for this principle, the Johnson case is directly in conflict with **Jencks v. U. S.**, 353 U. S. 657 and **Rosenberg v. U. S.**, 360 U. S. 367, in that this court has held in both cases that it is impossible for a judge to be fully aware of all the possibilities for impeachment inhering in a prior statement of a government witness.

The Petitioners in the instant case requested the statements and reports of the government agents, witnesses who testified, for the sole purpose of determining whether the transaction related in the memorandums or reports were consistent with the testimony of the agents on the stand. It is difficult to see a clearer set of facts for the application of Title 18, Sec. 3500, Subsection (e), Paragraph 1.

In **Borges v. U. S.**, 270 F. 2d 332, a demand was made for a summary of an agent made a month after the interview of a witness. The demand was made obviously not to impeach the government agent, but to impeach the other witness who had previously testified. The court said that a summary of an interview made a month after the interview could not be considered a verbatim statement of the witness. This case, however, does not stand for the proposition that the summary could not be used to impeach the agent who prepared it.

In the Papworth case, supra, a demand was made for the agent's reports after the informer had finished testifying. The court merely held that the agent's report was not a substantial verbatim recital of the informer's testimony. The Papworth case and Borges case, supra, merely anticipated the decision of the Supreme Court in **Palermo v. U. S.**, 360 U. S. 343, and they arose out of a similar set of facts. In the Palermo case, the defendants were demanding the memoranda and reports from the government in order to try to impeach a witness other than the agent who made the report. The court simply held that in keeping with the theory behind the Jencks statute it would be grossly unfair to allow the defendants to use statements to impeach a witness which could not fairly be said to be the witness' own rather than the product of the investigator's selections, interpretations, and interpolations. The court held in the Palermo case merely

that the statements, memoranda and reports of the government could not be considered statements of the accountant so as to impeach the accountant. In the instant case the government agents had testified and admitted that they had written reports relating to the testimony they had just given under direct examination (Appellants' App., p. 97, Ira L. Minton and Wilbur Buescher, p. 102). The memoranda and reports demanded fell directly without any dispute into the definition of Title 18, Sec. 3500, Subsection (e), Paragraph 1.

It is respectfully submitted that the court below completely ignored the definition of a statement in Title 18, Sec. 3500, Subsection (e), U. S. C., and that the court did some "legislative chiseling," a process that Judge Schnackenberg stated during oral argument in the instant case when argued below would be necessary if the government's position was to be sustained. These Petitioners are at a loss to know exactly what "legislative chiseling" is, but its net effect has been to deprive these petitioners of their absolute rights under the statutes, and what is probably even more important to deprive all defendants, similarly situated as these Petitioners were here, of any advantage they could have derived from the Jencks statute.

CONCLUSION.

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

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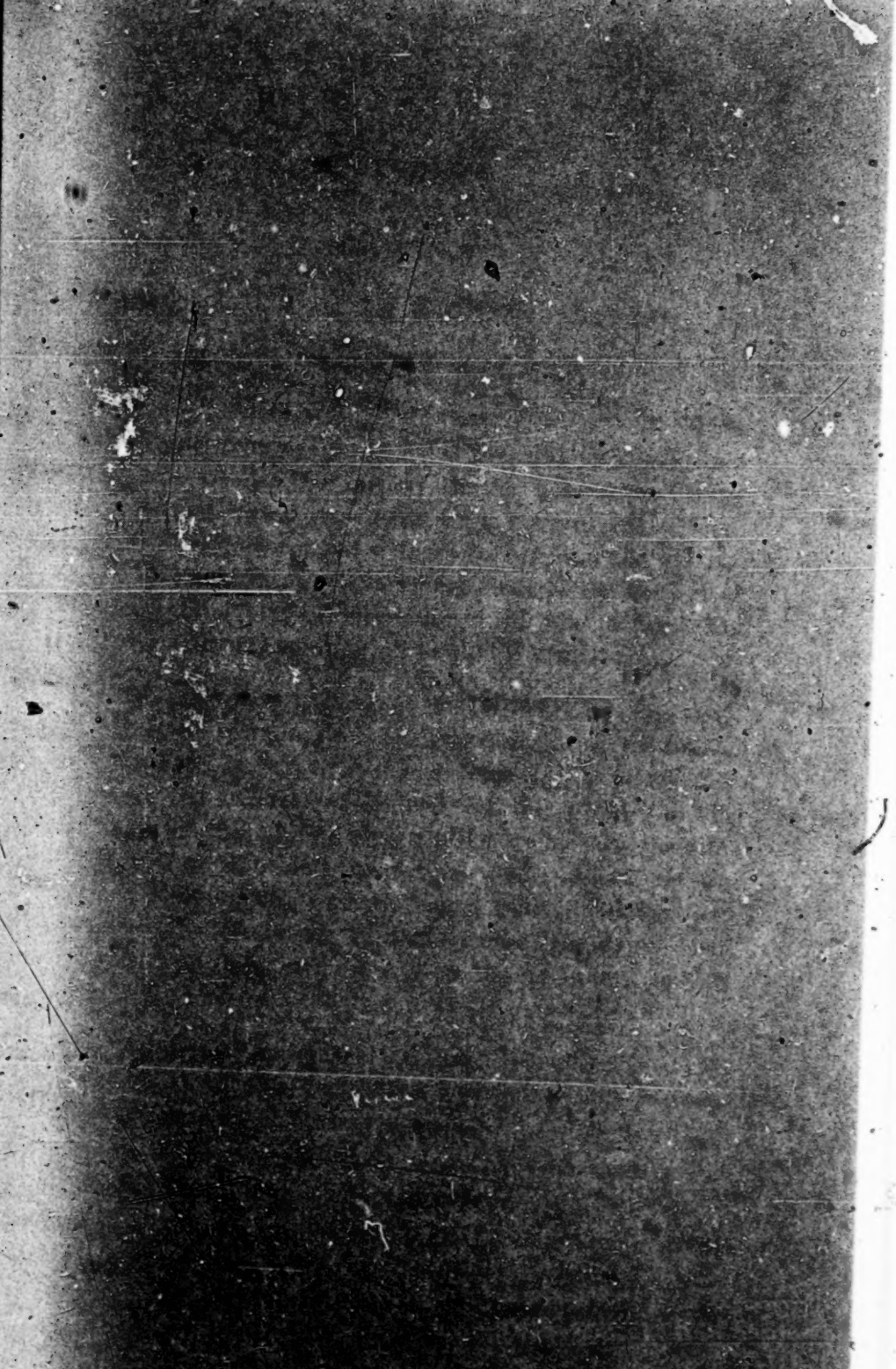

APPENDIX A.

STATUTES.

Title 18, U. S. C., Sec. 3500 (a) (b) and (e).

§ 3500. Demands for production of statements and reports of witnesses.

(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a government witness or prospective government witness (other than the defendant) to an agent of the Government shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(e) The term "statement" as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made

by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement. Added Sept. 2, 1957, Pub. L. 85-269, 71 Stat. 596.

Chapter 35—Taxes on Wagering.

Subchapter A—Tax on Wagers.

Title 26, U. S. C., Sec. 4403. Record requirements. Each person liable for tax under this subchapter shall keep a daily record showing the gross amount of all wagers on which he is so liable, in addition to all other records required pursuant to Section 6001 (a), Aug. 16, 1954, 9:45 A. M. E. D. T., C. 736, 68A Stat. 525.

Chapter 35—Taxes on Wagering.

Subchapter C—Miscellaneous Provisions.

Title 26, U. S. C., Sec. 4423. Inspection of Books. Notwithstanding Section 7605 (b), the books of account of any person liable for tax under this chapter may be examined and inspected as frequently as may be needful to the enforcement of this chapter. Aug. 16, 1954, 9:45 A. M. E. D. T., C. 736, 68A Stat. 528.

Chapter 61—Information and Return.

Subchapter A—Returns and Records.

Title 26, U. S. C., Sec. 6001. Notice or regulations requiring records, statements and special returns. Every person liable for any tax imposed by this title, or for the collection thereof, shall keep such records, render such statements, make such returns, and comply with such rules and regulations as the Secretary or his delegate may from time to time prescribe. Whenever in the judgment of the Secretary or his delegate it is necessary, he may require

any person, by notice served upon such person or by regulation, to make such returns, render such statements, or keep such records as the Secretary or his delegate deems sufficient to show whether or not such person is liable for tax under this title. Aug. 16, 1954, 9:45 A. M. E. D. T., C. 736, 68A Stat. 731.

Chapter 78—Discovery of Liability and Enforcement of Title.

Title 26, U. S. C., Sec. 7605 Time and place of examination.

. . . . . .

(b) Restrictions on examination of taxpayer. No taxpayer shall be subjected to unnecessary examination or investigations, and only one inspection of a taxpayer's books of accounts shall be made for each taxable year unless the taxpayer requests otherwise or unless the Secretary or his delegate, after investigation, notifies the taxpayer in writing that an additional inspection is necessary.

Federal Rules of Criminal Procedure 41 (a), (b).

Rule 41. Search and Seizure.

(a) Authority to Issue Warrant. A search warrant authorized by this rule may be issued by a judge of the United States or of a state or territorial court of record or by a United States commissioner within the district wherein the property sought is located.

(b) Grounds for Issuance. A warrant may be issued under this rule to search for and seize any property

(1) Stolen or embezzled in violation of the laws of the United States; or

(2) Designated or intended for use or which is or has been used as the means of committing a criminal offense.

Internal Revenue Regulations.

Reg. 132, Sec. 325.32. Records.—(a) In general—(1) Every person required to pay the excise tax imposed by section 3285 shall keep, or cause to be kept, at his office or principal place of business, or, if he has no office or principal place of business, at his residence or some other convenient office or safe location, such records as will clearly show as to each day's operation:

(A) The gross amount of all wagers accepted;

. . . . . .

(b) Period for retaining records.—The records required by this section shall, at all times, be open for inspection by internal revenue officers, and they shall be maintained for a period of at least four years from the date the tax became due. (Reg. 132, Sec. 325.33.)

Amendments to the Constitution of United States.

Amendment IV.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. . .

Amendment V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, ... nor shall be compelled in any criminal case to be a witness against himself, . . .

APPENDIX B.

OPINION AND JUDGMENT.

Opinion.

In the
United States Court of Appeals
For the Seventh Circuit

September Term, 1959—January Session, 1960

No. 12815

United States of America,
Plaintiff-Appellee,
v.

Thomas D. Clancy,
James F. Prindable and
Donald Kastner,
Defendants-Appellants.

Appeal from the United States District Court for the Eastern District of Illinois.

March 24, 1960

Before Hastings, Chief Judge, and Schnackenberg, Circuit Judges, and Steckler, District Judge.

Steckler, District Judge. Thomas D. Clancy and James F. Prindable, two of the named defendants, were convicted in the district court of making a false statement of a material fact to agents of the United States Treasury Department, Internal Revenue Service, in violation of 18

U. S. C., § 1001; of willfully attempting to evade a substantial amount of wagering excise taxes due and owing by virtue of Chapter 35, subchapter A of the Internal Revenue Code of 1954 (26 U. S. C., § 4401), in violation of 26 U. S. C., § 7201; and of conspiring to violate that subchapter, in violation of 18 U. S. C., § 371. Donald Kastner, the other defendant, was convicted on the latter two counts, but was found not guilty of the false statement count. Trial was by jury.

Defendants raise numerous points on appeal, all of which can be classified under the following broad headings:

1. The legality of the search and seizure of defendants' books and records.

2. Whether the district court erred in overruling defendants' motions to dismiss the indictment on the grounds that the grand and petit juries were illegally drawn and constituted.

3. Whether the court committed reversible error in refusing to ask certain questions on the *voir dire* examination of petit jurors.

4. Whether the court erred in admitting certain exhibits into evidence, and in admitting testimony as to statements of individual defendants without cautionary instructions to the jury.

5. Whether the court erred in refusing to order the production of reports of federal agents for use by the defendants during cross-examination, pursuant to 18 U. S. C., § 3500.

6. Whether the court erred in refusing to order acquittal both before and after the verdict.

7. Whether the court erred in instructing the jury and in refusing to give certain instructions tendered by defendants.

8. Whether the court erred in refusing to grant a new trial after hearing evidence of possible misconduct on the part of a petit juror.

In order to resolve these issues, a somewhat detailed analysis of the record is essential.

There is evidence in the record that the defendants, Thomas D. Clancy, James F. Prindable and Donald Kastner, were partners in the North Sales Company, and as such were engaged in accepting wagers, principally on horse races, in East St. Louis, Illinois. The defendants, doing business as the North Sales Company, by Thomas Clancy, applied for and received the special tax stamp for the fiscal year ending June 30, 1957, as required by 26 U. S. C., § 4411. In the special tax return and application for registry-wagering, the business address of the company was designated "at Large—2401 Ridge Ave.—E. St. Louis, Ill." However, when the application was produced at the trial by a government witness, the words "at Large" had been penciled through.[1] The defendants filed monthly tax returns of wagers accepted by them and paid the tax reported to be due thereon to the District Director of Internal Revenue at Springfield, Illinois. Defendants received a letter from H. J. White, District Director, dated April 17, 1957, which informed them that a recent examination of their tax liability for the years January, 1955, through December, 1956, indicated that no change was necessary to the tax reported and that the returns would be accepted as filed.

The record indicates that during March, April, and early May of 1957, federal agents of the Internal Revenue

[1] The government witness, Joseph M. Heckelbech, Chief of the Collection Division of the District Director's Office, could not say when the words "at Large" had been stricken out. However, witness Waller, the defendants' bookkeeper, testified that the words "at Large" were not stricken out when he filed the application; that the application was not returned to him as being incorrect; and that the stamp had been issued pursuant to the application.

Service observed activities which lead them to believe that a gambling operation was being conducted on the premises located at 2300 and 2300A State Street, East St. Louis, Illinois. The first floor of the premises was occupied by a business known as "Zittel's Tavern," and the second floor, 2300A, was an apartment. According to the affidavit for search warrant, Agent Johnson placed wagers with "Heine" and "Murphy" at Zittel's Tavern, the latter being a bartender there, and observed Heine walk to a doorway behind the bar which leads upstairs over the men's toilet and place money envelopes in a stairwell area and close the door. Heine later picked up an envelope from behind the door which contained Agent Johnson's winnings from a prior bet. Johnson also observed scratch sheets, racing forms, money and 4-inch by 6-inch paper pads on the bar, back bar, under the bar, on tables, in the stairwell and in the safe. Agent Mueller observed a man carrying a sack, similar to sacks furnished by banks to carry money, enter the tavern, speak to Murphy, the bartender, and go behind the bar and through a door which leads upstairs. Agent Yerly observed Charles J. Kastner, Jr., brother of the defendant Donald Kastner, and the defendant Prindable, both well known bookmakers, enter Zittel's Tavern at 7:09 and 7:17 a. m., respectively, on May 1, 1957. Agent Ryan entered the tavern shortly after Charles J. Kastner, Jr., on that morning and saw Prindable enter and go behind the bar and through a door that leads upstairs. Agent Buescher interviewed two well known bookmakers in Collinsville, Illinois, and was told by them that they picked up horse bets and ordinarily received telephone bets at Blaha's Tavern in Collinsville. Agent Busch examined a transcript of toll calls pertaining to Blaha's Tavern, using Illinois Bell Telephone records, and established that between August 11, 1956, and January 25, 1957, twenty-one (21) telephone calls were made between Blaha's Tavern

and 2300A State Street, East St. Louis. The telephone at 2300A State Street was subscribed to by one John Leppy. Agent Yerly examined the application for the occupational tax stamp of Charles J. Kastner, Jr., and Prindable, which stated that their business address was 2401 Ridge Avenue.[2] Joseph M. Heckelbech, Chief of the Collection Division in the office of the District Director at Springfield, examined the records in his custody and determined that no gambling stamp had been issued to John Leppy, Henry D. Zittel, or any other person at 2300A State Street; and that no wagering excise fax returns had been filed by anyone at that address.

Upon this evidence, Agent Johnson applied to the district court for two search warrants, one for the first floor, and the other for the second floor of the building at 2300 and 2300A State Street. (Here on appeal we are concerned only with the search of the second floor, 2300A.) The part the other agents performed in the investigation was set forth in their separate affidavits which were, by reference, made a part of the Agent Johnson's affidavit for the search warrant for the second floor. In addition, Agent Edwards corroborated much of the statement of Agent Yerly. The affidavit of Agent Johnson for the search warrant for the second floor states, in part, that he is positive the premises

> ". . . are being used in the conduct and carrying on of a 'Wagering Business,' . . . against the laws of the United States, that is to say, the offense of wilfully attempting to evade and defeat a tax imposed by the Internal Revenue Laws . . . and the payment thereof, to wit, the special tax of $50 a year to be paid by each person engaged in the business of accepting wagers . . .: and the offense of wilfully fail-

[2] This address was actually the residence of defendant Clancy, which appeared after the "at Large" designation had been penciled out.

ng to prepare and file with the district Director . . . he Special Tax Return and Application for Registry-Wagering (Form 11-C) . . . in the name of the operator of said business, namely, one John Doe. . . ."

The district court, satisfied that there was probable cause to believe that a wagering business was being conducted on the premises described in violation of the said laws of the United States, issued the search warrants requested on May 5, 1957. The second floor warrant was addressed to "any Special Agent of the Intelligence Division of the Internal Revenue Service of the United States of America," and authorized the seizure of:

". . . divers records to wit books, memoranda, tickets, pads, tablets and papers recording the receipt of money from and the money paid out in connection with the operation of a wagering business on said premises, such files, desks, tables and receptacles for the storing of the books, memoranda, tickets, pads, tablets and papers aforesaid, and divers receptacles in the nature of envelopes in which there is kept money won by patrons . . . and divers other tools, instruments, apparatus, United States currency and records . . ."

On May 6, 1957, Agent Kienzler, accompanied by several other agents, executed the second floor search warrant and seized defendants' notes, books and records, currency in excess of $2,160, racing forms, scratch sheets, telephone bills, a check book, and several metal boxes. Defendant Donald Kastner was present in the apartment when the search was made and informed the agents that he, Clancy, and Prindable were partners in the North Sales Company and that the partnership had a tax stamp, which Clancy took care of. Agent Kienzler testified that he did not personally determine at that time whether the North Sales Company actually had a tax stamp, but obeyed the com-

mand of the warrant in searching and seizing the items described. Apparently no arrests were made at the time of the raid.

Subsequently, information obtained from the seized records was presented to a grand jury which, on July 25, 1957, returned a five-count indictment against the defendants. The first three counts charged Clancy, Kastner and Prindable severally with making false statements to agents of the Internal Revenue Service in violation of 18 U. S. C., § 1001.[3] Count IV charged each defendant with an attempt to evade a substantial amount of wagering excise tax during the fiscal year ending June 30, 1957. In support of this count specific unlawful acts were alleged.[4] Count V was the conspiracy count and alleged substantially the same acts as Count IV.

The defendants pleaded not guilty on July 30, 1957, and on August 14th following, filed a joint motion to dis-

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[3] In Count I, Clancy was charged with making a false statement to Agents Mochel and Buescher on December 13, 1956, when he stated that the North Sales Company had no employees or agents accepting bets other than Charles J. Kastner, Jr., and Malcolm Wagstaff. In Count II, Kastner was charged with making a false statement to Agent Kienzler on May 6, 1957, the day of the raid, by stating that he did not know the names of individuals accepting wagers as agents of the North Sales Company. In Count III, Prindable was charged with making a false statement to Agents Mochel and Buescher on December 14, 1956, when he stated that he did not know any other horse bookies except himself, Clancy and Donald Kastner.

[4] In substance it was alleged:

1. During March, 1957, defendants reported wagers of $11,913.50, but actually received wagers in the amount of $103,441.30.

2. Defendants kept false books and concealed the identity of agents.

3. Defendants concealed and withheld records, sources of income, and lists of agents.

4. Defendants maintained secret places of doing business.

5. All three defendants made false statements to government agents.

miss the indictment and a motion for return of property and to suppress evidence. As far as relevant here, the motion to dismiss was based upon an allegation that the members of the grand jury were not "selected, drawn or summoned according to law." The motion to suppress attacked the affidavit of Agent Johnson as based on hearsay; the warrant's description of the articles to be seized as too general; the existence of probable cause; and the seizure of allegedly private books and papers. Defendants also filed a motion to inspect the transcript of evidence and record of the foreman of the grand jury.

In an entry dated July 25, 1958, the district court denied all three of the above motions. The court held, *inter alia*, that the charges in respect to the grand jury were mere "naked allegations"; that probable cause did exist; and that the items seized were specifically described in the warrant and were not private books or papers, but rather "property used in the commission of crime."

On May 8, 1959, defendants filed an amended motion to dismiss with an affidavit of the jury commissioner, Bohlen J. Carter, attached. In the affidavit the jury commissioner states that names of prospective jurors were solicited from various persons, including school superintendents. When the juries were drawn, he and the clerk, Douglas H. Reed, separately took a handful of cards from the box and sorted them according to the distance they lived from the place at which the grand and petit juries were to function, namely East St. Louis, Danville, Cairo, or Benton, Illinois. Only those thought to live within a reasonable distance would be selected.[5] The other names would

[5] In the affidavit Mr. Carter mentioned 50 to 60 miles as a "reasonable distance." In subsequent testimony in another proceeding, made a part of this record by an offer of proof by defendants, Mr. Carter corrected this statement by stating that the distance was actually 100 to 123 miles. Mr. Reed testified in this extraneous proceeding that the distance was approximately 150 miles.

be placed back in the box. Carter also stated that he did not know how many names were in the box, but estimated about 200 or possibly 400 to 500. Defendants complained that the grand jury was not selected according to law, 28 U. S. C., § 1864, and that it was not selected by chance, but by "whim and caprice."

The court denied the amended motion to dismiss on the grounds that the grand jury had been properly drawn; that even if there were irregularity, defendants had failed to show prejudice or the violation of any constitutional rights; and that the motion was filed too late according to local rules.

During the course of the trial, the court admitted the search warrant and return (Government Exhibit 29a) and the various records and articles seized in the raid (Government Exhibits 54 through 112) into evidence. Defendants objected on the basis of an illegal search and also on the ground that relevancy and materiality had not been shown. Agent Kienzler merely stated that these were the articles seized in the raid. Later, however, the chain of custody of the exhibits was established and Agent Mochel testified that he had used Exhibits 54 through 79 to determine that the total amount of bets actually placed with defendants in March, 1957, was $103,441.30.

Defendants also objected to the admission into evidence generally of statements allegedly made by them individually to government agents. Defendants claim that such statements were admissible only as against the one making them, since a conspiracy had not yet been established, and, as to the statements of defendant Kastner, that any conspiracy, if it had existed, was terminated when the statements were made.

Agents Buescher and Mochel testified that they interviewed Clancy on December 13, 1956, in the office of Press

Waller. They testified that during the interview Clancy identified the other defendants as partners in the North Sales Company; stated that they had no particular place of business; and that they had only two agents. The agents also testified that Clancy stated that they did not use the telephone, but went from place to place accepting wagers. The statement made by Clancy during this interview with respect to not having any employees or agents, other than Charles J. Kastner, Jr., and Malcolm H. Wagstaff, was the basis of Count I of the indictment.

Agents Buescher and Mochel also testified that they had an interview on December 14, 1956, with Prindable in Waller's office, in the presence of Donald Kastner. In the interview, according to the testimony, Prindable stated that he paid off bettors in person and that he never "laid off" any bets. In answer to a question asking whether he could recommend another bookie to take a bet larger than he could handle, Prindable stated that he did not know of any other horse bookies except himself, Clancy and Donald Kastner. The latter statement was the basis of Count III of the indictment.

Agents Kienzler and Minton were permitted to testify to the substance of a conversation between Kienzler and the defendant Kastner at the time of the raid. According to the testimony, Kastner stated that he was a junior partner and clerk of the North Sales Company, answered the telephone and took bets. He worked on a commission basis. Kastner named the other two defendants as partners and stated that Clancy took care of the records and had the tax stamp. This interview was the basis of Count II of the indictment.

Supervisor Hudak and Agent Mueller testified to the substance of a second interview with Kastner in the offices of the United States Attorney in the Federal Building in East St. Louis, on July 23, 1957, two and one-half months

after the raid. According to their testimony, Kastner in this interview admitted taking bets by telephone at 2300A State Street and also at the residence of one Vernon Lampe. He explained in detail the manner in which bets were recorded and the business conducted. Kastner also named various "agents" who accepted bets for the North Sales Company, including Merlin Behnen, a tavern keeper, and Otto Pohlman; and described the arrangements had with the "agents," i. e., forty or fifty per cent bets, in which the "agents" received forty or fifty per cent of the prout and shared forty or fifty per cent of the loss, or five per cent bets, in which the agents received five per cent of the gross amount of bets placed.

After Agent Buescher had testified to the interviews with Clancy and Prindable, the defendants on cross-examination established that Buescher had prepared, signed and submitted to his superior, Mochel, a written report pertaining to the substance of the interviews. The report was composed after Buescher had returned to his office. Buescher did not take longhand notes at the time of the interviews, but in preparing the report agreed with and used contemporaneous longhand notes taken by Agent Mochel. During the testimony of Agent Minton it was brought out that he made a similar report to his superiors, under like circumstances, following the conversation between Kienzler and Donald Kastner at the time of the raid on May 6, 1957.

Defendants demanded production of these reports for use during cross-examination under the provisions of the so-called "Jencks Act." 18 U. S. C., § 3500. The district court denied the requests on the ground that the reports were not made contemporaneously with the interviews, but subsequent thereto. However, the court did require the Government to turn over to the defendants for inspection after direct examination, the longhand notes taken at the

time of the interviews by the agents. Thus, defendants received the notes taken by Agent Mochel during the interviews with Clancy and Prindable in December, 1956, and the notes taken by Supervisor Hudak and Agent Mueller during the interview with Kastner in the Federal Building on July 23, 1957. Defendants made no request for any notes taken by Agent Kienzler during the May 6, 1957, conversation with Kastner.

The defense called no witnesses, but attempted to develop a theory of defense by cross-examination of government witnesses and argument of counsel. As to the false statement count against Clancy, the defense theory apparently was that the individual bet takers, other than Charles J. Kastner, Jr., and Malcolm Wagstaff, were "independent contractors," rather than "agents." The statement of Prindable, that he did not know any other horse bookies, according to defense counsel, was not false when considered in context. The agents had asked him if he could recommend any other book to take a bet larger than he could handle. His reply, under the circumstances, it is asserted, meant that he did not know any other horse book that would take bets larger than he. The principal theory as to Counts IV and V was apparently that the excess of bets, not reported, represented "lay-off" bets from other bookies. The defendants allegedly did not know that they were required to report these bets as part of the gross bets received. Defendants also argue that all of the evidence as to willfulness applied only to Clancy, who actually had charge of the books and records.

The trial court overruled defendants' motion for acquittal and submitted the case to the jury. The defendants tendered certain instructions, which the court refused to give, and to this, the defendants complain that the court failed to properly instruct the jury on their theory of the case. Defendants also objected to certain of the court's

instructions as not supported by the evidence, as being misleading and confusing to the jury, and as not containing all the elements of the crimes charged.

Subsequently, defendants filed motions for acquittal notwithstanding the verdict and for a new trial. One of the grounds urged in support of the latter motion was that a petit juror who served in the case had stated privately to another prospective juror that he was prejudiced against anyone who accepted wagers; but on voir dire stated that he was not so prejudiced. In support of this allegation, defendants called one Mrs. Vera Simmons, an original member of the jury panel, who testified that a male juror sitting next to her stated privately that he felt the same as she did, after Mrs. Simmons acknowledged prejudice against gamblers to the court and was excused for cause. Mrs. Simmons could not remember the juror's name, on which side of her he sat, or whether he had actually served on the petit jury. One of defendants' counsel, Paul P. Waller, Jr., asked permission to testify as to the seating arrangement of the jury panel, and offered to prove that the male jurors sitting on both sides of Mrs. Simmons did in fact serve on the petit jury, and that one of them, Clinton Beinfohr, served as the foreman of the jury. The court denied permission to testify, unless Mr. Waller would withdraw from the case. Mr. Waller refused to withdraw, and his testimony was not heard.

The court denied the motions for judgment of acquittal notwithstanding the verdict and for a new trial. In regard to the misconduct of juror issue, the court stated that the testimony of Mrs. Simmons absolutely failed to substantiate the allegations of misconduct on the part of a juror who actually served. Further, the court stated that the defendants' counsel had reported the matter to the court in a conversational manner in chambers during the trial. The court at that time advised counsel that there was

nothing before it on which to act. However, the defendants made no motion or request of any kind, but waited until after the verdicts of guilty had been returned before pursuing the matter fully. Under the circumstances, the district court concluded, defendants "failed to challenge the alleged prejudice of the juror in apt time."

The defendants' first major argument concerns the denial of the motion to suppress. In support of their argument, defendants attack the basis upon which the warrant was issued, the form of the warrant itself, and the nature of the articles seized pursuant thereto.

It seems paramount that we first determine whether there was probable cause to believe a crime was being committed at the premises to which the affidavits and search warrants were directed. Defendants say there was no probable cause and that the affidavits were invalid because based upon hearsay.

In determining whether probable cause exists for the issuance of a search warrant it need not be determined whether the offense charged has actually been committed; the only concern being whether the affiant has reasonable grounds, at the time of the making of the affidavit and the issuance of the warrant, for believing the law was being violated on the premises to be searched. **Dumbra v. United States**, 268 U. S. 435, 441 (1925); **Carney v. United States**, 163 F. 2d 784, 786 (9th Cir. 1947), **cert. denied**, 332 U. S. 824. Probable cause exists where the facts and circumstances within the officers' knowledge, and of which they have reasonably trustworty information, are sufficient in themselves to warrant a belief by a man of reasonable caution that a crime is being committed. **Brinegar v. United States**, 338 U. S. 160, 175-176 (1949); **Dumbra v. United States**, supra.

It appears from the argument made by the defendants that they would have this court consider only their status

as licensed gamblers, and disregard the knowledge the agents had in respect to the activities taking place at the State Street address. They assume the warrant was issued for the express purpose of seizing their books and records, for they argue that since they had registered, received a wagering stamp, and paid some wagering taxes, there was no probable cause for seizure of their books. But, as pointed out by the Government, what defendants overlook by such argument is the fact that the warrant was not issued for the purpose of seizing **their** books. The warrant was directed to certain premises and ordered the seizure of property described therein. It did not order the seizure of defendants' property because it was not known at the time who was operating the wagering business at the address stated in the warrant. From the agents' observations there was probable cause to believe that a wagering activity was being operated in violation of the laws of the United States, especially since the premises had not been reported to the District Director as required by 26 U. S. C., § 4412.[6] See **Merritt v. United States**, 249 F. 2d 19 (6th Cir. 1957).

The defendants' argument that the search warrant for the second floor of the building was invalid because issued upon affidavits based upon hearsay, is likewise without merit. A cursory examination of the affidavits upon which the warrant was issued, without regard to hearsay, and based only on the knowledge of the affiants from personal

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[6] "§ 4412. Registration

(a) Requirement.—Each person required to pay a special tax under this subchapter shall register with the official in charge of the internal revenue district—

(1) his name and place of residence;

(2) if he is liable for tax under subchapter A, each place of business where the activity which makes him so liable is carried on, and the name and place of residence of each person who is engaged in receiving wagers for him or on his behalf;

* * *"

observations, clearly takes this case out of the ambit of the cases relied on by the defendants, i. e., **Sparks v. United States**, 90 F. 2d 61 (6th Cir. 1937); **Crank v. United States**, 61 F. 2d 981 (8th Cir. 1932); **Simmons v. United States**, 18 F. 2d 85 (8th Cir. 1927); **United States v. Clark**, 18 F. 2d 442 (D. Montana 1927); and **United States v. Lassoff**, 147 F. Supp. 944 (E. D. Ky. 1957).

As to the form of the search warrants, defendants state that they were void in that they were not directed to any particularly named person, but rather to a class; that the property to be seized was not capable of accurate determination, inasmuch as the words, "letters, tickets, papers, records and books," is not a sufficient description; that exploratory searches may not be made to look for evidence with or without a search warrant, and that an invalid search is not made lawful by what it brings to light.

By the terms of 18 U. S. C., § 3105, it is provided:

> "A search warrant may in all cases be served by any of the officers mentioned in its direction or by an officer authorized by law to serve such warrant, but by no other person, except in aid of the officer on his requiring it, he being present and acting in its execution."

Although it would be a better practice to direct the search warrant to a particular officer by name, the statute does not require it. So long as the warrant is directed to civil officers of the United States authorized to enforce or assist in enforcing any law thereof, or otherwise authorized to serve such warrant, even though they are not specifically named, but identified, it is sufficient. Rule 41 (c), F. R. Cr. P., **Gandreau v. United States**, 300 Fed. 21, 25 (1st Cir. 1924); see **United States v. Smith**, 16 F. 2d 788, 789 (S. D. Fla. 1927); **United States v. Nestori**, 10 F. 2d 570, 571 (N. D. Cal. 1925); **Boehm v. United States**, 6 F. 2d

497, 498 (7th Cir. 1924); **United States v. Tolomeo**, 52 F. Supp. 737, 738 (W. D. Pa. 1943).

That the articles to be seized by virtue of the search warrant were described with sufficient particularity, can hardly be questioned in view of the authorities. **Nuckols v. United States**, 99 F. 2d 353, 355 (D. C. Cir. 1938), **cert. denied**, 305 U. S. 626; **Merritt v. United States**, 249 F. 2d 19 (6th Cir. 1957); see also, **Clay v. United States**, 246 F. 2d 298 (5th Cir. 1957), **cert. denied**, 355 U. S. 863.

In the **Nuckols** case, supra, a search warrant was held sufficient which commanded the seizure of ". . . gaming tables, gambling devices, race horse slips and gambling paraphernalia . . ." The court said, at page 355:

> "In the search of a gambling establishment the same descriptive particularity is not necessary as in the case of stolen goods."

And in **Merritt v. United States**, supra, at page 20, the court approved affidavits for a search warrant, and the search warrant, where the affidavits described only ". . . lottery tickets and other paraphernalia 'which will indicate a numbers operation is being conducted on the premises.'"

As to the contention that the search was exploratory, in view of the evidence, and what we have heretofore set forth, we cannot agree that the search was merely exploratory.

The remaining point raised with respect to the motion to suppress is that the search and seizure was unreasonable and in contravention of defendants' rights under the Fourth and Fifth Amendments to the Constitution, for the reason that **private** books, records, papers and documents are not subject to seizure, even under authority of a search warrant. This protection, they contend, extends to partner-

ship books and papers. Defendants make the point that the property seized, constituted, "at most, evidence and did not constitute the instrumentalities for the commission of a crime against the United States."

The basis of their argument is that they had filed an application for registry-wagering and had, in fact, obtained a wagering stamp for the period in question; had filed monthly reports and paid the full amount of the tax reported. Consequently, it is argued that the books and records were not "instrumentalities" of a crime against the United States, and therefore could not be seized except in contravention of their constitutional rights. Stated in another way, it is insisted that in so far as the federal laws were concerned, defendants were engaged in a legitimate enterprise, and, for that reason, the books, papers and records used in connection therewith were not contraband, but private papers, protected against seizure under the Fourth and Fifth Amendments. Defendants rely heavily upon **Takahashi v. United States**, 143 F. 2d 118 (9th Cir. 1944). In that case the defendants were charged with conspiracy, with violation of an executive order by designating China as the country of destination on an application for license to export certain new storage tanks when in fact Japan was the country of ultimate destination, and with causing false and fraudulent statements to be made in the application in a matter within the jurisdiction of the Department of State. Custom officers seized the documents in question, including code telegrams, letters, and other papers, indicating the true destination of the tanks was Japan. The court of appeals held that a motion to suppress should have been sustained and overruled the contention that the papers were more than mere evidence but were themselves the instrumentalities of a crime. The court in substance said that although the application for the license itself would be an instrumentality for the commisison of a crime, the tanks themselves and

papers taken from the defendants were mere evidence of **an intention** on the part of the defendants to commit a crime under both of the substantive counts in the indictment. In other words, evidence of crime or *malum in futuro*. Specifically the court said, at page 124:

> "The distinction must be drawn between papers which are a part of the outfit or equipment actually used to commit an offense such as the ledgers and bills used to maintain a nuisance exemplified by the situation developed in **Marron v. United States**, 275 U. S. 192, 199, 48 S. Ct. 74, 72 L. Ed. 231, and those papers which are simply evidences of intent, design or even of the agreement of the defendants."

Thus, the **Takahashi** case recognizes the rule that ledgers, bills and other types of books and records, may be the instrumentalities of a crime. We hold that gambling paraphernalia, such as that used by the defendants, when used in commission of a crime in violation of 26 U. S. C., § 7201, i. e., knowingly attempting to defeat and evade the wagering tax, becomes "a part of the outfit or equipment actually used to commit an offense," as mentioned in **Takahashi**, supra. See **Merritt v. United States**, supra; **Foley v. United States**, 64 F. 2d 1 (5th Cir. 1933), **cert. denied**, 289 U. S. 762; **Landau v. United States Attorney**, 82 F. 2d 285 (2d Cir. 1936).

Furthermore, there is good authority for holding that the books, records and papers seized in the case at bar were not such **private** papers as to be clothed with immunity from seizure and use against the defendants under the Fourth and Fifth Amendments. Under 26 U. S. C., §§ 4403, 4423, 6001, and United States Treasury Regulation 132, § 325.32, the defendants were required to keep books and records reflecting transactions carried on in the course of a taxable wagering activity. Such records were to be kept on a day-to-day basis and were required to be made

available for inspection by Internal Revenue officers at all times. In the case of **Boyd v. United States**, 116 U. S. 616 (1886), a case relied on by the defendants, the court stated, at 623-624:

> "The seizure of stolen goods is authorized by the common law; and the seizure of goods forfeited for a breach of the revenue laws, or concealed to avoid the duties payable on them, has been authorized by English statutes for at least two centuries past; and the like seizures have been authorized by our own revenue acts from the commencement of the government . . . As this act was passed by the same Congress which proposed for adoption the original amendments to the Constitution, it is clear that the members of that body did not regard searches and seizures of this kind as 'unreasonable,' and they are not embraced within the prohibition of the amendment. So, also, the supervision authorized to be exercised by officers of the revenue over the manufacture or custody of excisable articles, and the entries thereof in books required by law to be kept for their inspection, are necessarily excepted out of the category of unreasonable searches and seizures."

This exception to the privilege against self-incrimination and searches and seizures, has come to be known as the "required records exception," and has been recognized in numerous cases. **Shapiro v. United States**, 335 U. S. 1, 17-20, 32-33 (1948); **Davis v. United States**, 328 U. S. 582, 589-590 (1946); **Wilson v. United States**, 221 U. S. 361, 380 (1911); **Smith v. United States**, 236 F. 2d 260, 268 (8th Cir. 1956), **cert. denied**, 352 U. S. 909, **rehearing denied**, 353 U. S. 989; **Beard v. United States**, 222 F. 2d 84, 92-94 (4th Cir. 1955), **cert. denied**, 350 U. S. 846, **rehearing denied**, 350 U. S. 904. See also, Meltzer, **Required Records, The McCarran Act, and the Privilege Against Self-Incrimination**, 18 U. of Chi. L. Rev. 687 (1951).

In **Shapiro**, supra, at page 33, the court stated:

> "... the privilege which exists as to private papers cannot be maintained in relation to 'records required by law to be kept in order that there may be suitable information of transactions which are the appropriate subjects of governmental regulation and the enforcement of restrictions validly established.'"

In view of what has here been said, we conclude that the trial court committed no error in denying the defendants' motion to suppress.

We next take up the jury selection issue. We note that the original motion to dismiss did not specify any grounds and was not supported by competent evidence. Further, the amended motion to dismiss, at most, complained of mere irregularities and was filed too late according to the local rules of the district court.[7]

It is significant to note that the local rule is substantially the same as former Section 556 (a) of Title 18, U. S. C. That statute was discussed in **Wright v. United States**, 165 F. 2d 405, 407 (8th Cir. 1948). The court held that the right to challenge the grand jury panel was waived as the challenge was not seasonably presented in accordance with the ten-day limitation. In the recent case of

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[7] Rule 27, Rules of the United States District Court for the Eastern District of Illinois, provides:

"(d) A plea in abatement to an indictment directed against the legality of the grand jury returning said indictment shall not be entertained by the court unless the same shall have been filed within 10 days from the date of the return of the indictment; provided, however, that in the event the defendant has not been apprehended at the time the indictment is found such plea shall be filed within 10 days after his apprehension, unless he or his counsel shall sooner have been apprised of his indictment, in which case the plea shall be filed within 10 days after he or his counsel shall have been apprised of his indictment."

Scales v. United States, 260 F. 2d 21 (4th Cir. 1958), **rev'd on other grounds**, 355 U. S. 1, the court of appeals affirmed the district court's decision in refusing to entertain a motion challenging the grand jury. The decision was based upon Rule 12 of the Federal Rules of Criminal Procedure, inasmuch as the lower court had no rule comparable to Rule 27 of the lower court in this case. There the court noted, as in the instant case, the information upon which the motion was based was at all times available to the defendant. In that case the defendant was less than one year delinquent in making his motion, whereas here the defendants delayed almost twice that long. Most significant to us, however, is the defendants' failure to show any prejudice or the violation of any constitutional rights, either with respect to the grand jury, or the petit jury.

The defendants' motion to strike the array because of the alleged improper choosing and selection of the petit jury was filed after the jury had been selected. In their argument defendants cite **Ballard v. United States**, 329 U. S. 187 (1946), and **Glasser v. United States**, 315 U. S. 60 (1942). Those cases involved a systematic exclusion from the jury panel because of a particular sex or group. Nothing of the kind is involved in this case. In short, we find nothing wrong with the manner in which the prospective jurors' names were obtained. See **Local 36 of International Fishermen and Allied Workers of America v. United States**, 177 F. 2d 320, 341 (9th Cir. 1949); **Scales v. United States**, supra. Nor do we find material irregularity in the drawing of the names of those prospective jurors who were summoned for petit jury duty. **United States v. Gottfried**, 165 F. 2d 360, 364 (2d Cir. 1948), **cert. denied**, 333 U. S. 860, **rehearing denied**, 333 U. S. 883; **United States v. Skidmore**, 123 F. 2d 604, 607 (7th Cir. 1941).

Turning next to the alleged error in the court's conduct of the voir dire examination, it is well settled that such

examination is within the discretion of the trial judge, and the exercise of such discretion will not be disturbed on appeal in the absence of a clear showing of abuse. **United States v. Lebron,** 222 F. 2d 531, 536 (2d Cir. 1955), **cert. denied,** 350 U. S. 876; **Speak v. United States,** 161 F. 2d 562, 563 (10th Cir. 1947). The two tendered questions asked by the court[8] were designed to uncover prejudice against gamblers and religious scruples against gambling. The other questions tendered were merely cumulative and argumentative.[9] As to this issue we find no abuse of judicial discretion.

The trial court likewise has broad discretion in the order of admitting evidence at the trial. **United States v. Bender,** 218 F. 2d 869, 873 (7th Cir. 1955), **cert. denied,** 349 U. S. 920. Here the articles seized in the raid were relevant in the attempt to prove that the defendants were engaged in a wagering business and not paying the full amount of the required excise tax, a fact which the Government had to prove to secure a conviction on Counts IV and V of the indictment. Some of the exhibits were later used by Agent Mochel in support of his testimony that defendants received gross wagers in the amount of $103,441.30, in March, 1957.

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[8] "2. Do you teach Sunday School?

"7. Would you be prejudiced against anyone who accepts wagers?"

[9] "1. Do you believe that gambling itself is immoral, per se, or morally wrong?

"3. To what denomination, if any, do you so teach? . . .

"4. We also ask the Court to ask the jurors if they can give these defendants a fair trial even though the evidence shows that the laws, gambling laws, of the State of Illinois were violated. . . .

"5. Can you separate the violation of the law with which they are charged in the indictment, that is, the laws of the United States separate and apart from the violation of state laws?

"6. Do you have a prejudice against people engaged in the business of operating horse books?"

The admission of the agents' testimony without cautionary limitation concerning the substance of the four interviews with the defendants was not, in our view, reversible error. Evidence of admissions of co-conspirators may be presented prior to the conclusive establishiment of the conspiracy without commisison of error so long as the conspiracy is established at some time during the course of the trial. **United States v. Sansone**, 231 F. 2d 887, 893 (2d Cir. 1956), **cert. denied**, 351 U. S. 987. Since the jury could conclude from all the evidence that a conspiracy had been conclusively established, there was no error in the admission of the evidence on that ground. It is likewise clear that the conspiracy, if any, had not terminated in December, 1956, the time of the interviews with Clancy and Prindable, and on March 7, 1957, the time of the first interview with Kastner. The second interview with Kastner, on July 23, 1957, presents a more difficult question. Although no arrests had been made up to that time, the defendants' gambling operation had been raided, and their books and records seized, some two and one-half months prior thereto. However, defendants were not subsequently charged with operating an illegal gambling business, but with attempting to evade a substantial amount of wagering excise tax. The district court could reasonably find that a conspiracy to violate 26 U. S. C., § 7201, had not terminated at the time of the July 23d interview. The usual criterion for determining the conclusion of a conspiracy is the arrest of the co-conspirators. **Sandez v. United States**, 239 F. 2d 239, 243 (9th Cir. 1956); **Cleaver v. United States**, 238 F. 2d 766, 769 (10th Cir. 1956). Cf. **Scarborough v. United States**, 232 F. 2d 412 (5th Cir. 1956). Moreover, even if the declarations of one co-conspirator are erroneously received as evidence against another co-conspirator, there is no reversible error if, as here, there is other competent evidence sufficient to prove the facts sought to be established by such declarations. **Massicot v. United**

States, 254 F. 2d 58, 64 (5th Cir. 1958); **Papadakis v. United States**, 208 F. 2d 945, 953 (9th Cir. 1953).

The next contested issue is whether the trial court erred in refusing to order the Government to produce the memoranda or reports of the government agents pursuant to the "Jencks" Act, 18 U. S. C., § 3500.[10] Defendants rely on the decision in **Bergman v. United States**, 253 F. 2d 933 (6th Cir. 1958).

Since the "Jencks" Act was the direct outgrowth of the decision in **Jencks v. United States**, 353 U. S. 657 (1957), the statute must be read and interpreted in the light of that decision. **Palermo v. United States**, 360 U. S. 343, 345 (1959). "The Act's major concern is with limiting and

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[10] The pertinent parts of the statute read:

"§ 3500. Demands for production of statements and reports of witnesses

"(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of the Government shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

"(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. . . .

* * *

"(e) The term 'statement', as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

"(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

"(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement."

regulating defense access to government papers, and it is designed to deny such access to those statements which do not satisfy the requirements of (e), or do not relate to the subject matter of the witness' testimony. It would indeed defeat this design to hold that the defense may see statements in order to argue whether it should be allowed to see them." **Palermo v. United States**, supra, page 354.

We think there is a distinction between the type of case here at hand and those cases in which the Government produces as a witness an undercover agent whose dealings with the accused are the subject of the agent's testimony at the trial. Here the defendants were aware of the identity of the government agents at the time they made the statements which later furnished the basis of the prosecution against them. They were not dealing with undercover agents whose true identity they did not know. Cf. **Jencks v. United States**, supra; **Bradford v. United States**, 271 F. 2d 58 (9th Cir. 1959); **United States v. Prince**, 264 F. 2d 850 (3d Cir. 1959).

The final decision as to production must rest within the good sense and experience of the district judge guided by the standards as outlined by the Supreme Court,[11] and subject to the appropriately limited review of the appellate courts.

It is significant to note, that at the request of defendants' counsel the court required the Government to turn over to the defense, for use in cross-examination, the longhand notes taken at the time of the interviews. In view of this, we are unwilling to agree that there was an abuse

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[11] The Supreme Court has said that the statute does not provide that inconsistency between the statement and the witness' testimony is to be a relevant consideration, nor that the statement be admissible as evidence. *Palermo v. United States*, *supra*, p. 353, n. 10.

of judicial discretion on the part of the trial judge in not ordering the production of the memoranda prepared by the witnesses after the interviews had been completed, particularly since parts of the memoranda were based upon the notes and interpretations of other agents. We hold that such reports and memoranda are not statements within the meaning of the statute. Accordingly, the defendants were not entitled to their production for use in the trial. **Palermo v. United States**, supra; **Johnson v. United States** 269 F. 2d 72 (10th Cir. 1959); **Borges v. United States**, 270 F. 2d 332 (D. C. Cir. 1959); **Papworth v. United States**, 256 F. 2d 125 (5th Cir. 1958), **cert. denied**, 358 U. S. 854, **rehearing denied**, 358 U. S. 914.

Next, defendants complain that the trial court committed reversible error in refusing to direct an acquittal, or in the alternative to grant a new trial. In support of this allegation, defendants argue that the Government failed to prove that the tax allegedly due was in fact not paid by the various government witnesses who testified that they had received bets ultimately covered by the defendants. This argument is based upon defendants' contention that the various tavernkeepers who accepted bets were not "agents" of the North Sales Company, but rather independent bookies who were themselves liable for the 10 per cent excise tax on wagers accepted by them, notwithstanding the fact that they laid-off a portion of the bets to defendants. Treasury Regulation 325.24 (b).

The record shows that on cross-examination by defendants' counsel, the tavernkeepers testified that the defendants exercised no control over them as to which bets to accept or reject. However, the record also shows that all but one testified that they were directly engaged by one of the defendants to receive wagers, and received their commissions on a monthly basis. They also testified that upon receiving wagers they reported them to the North

Sales Company by telephone. A messenger delivered form sheets and scratch sheets to them and either picked up the money received as wagers, or left money for the payment of winners. It appears that all records of wagers and computations of winnings and losses were made by defendants. Agent Mochel testified that his examination of defendants' books and records did not reveal any attempt to differentiate between regular bets and lay-off bets. Likewise, defendants did not report that they had accepted any lay-off wagers on their wagering tax returns for July, 1956, through April, 1957, although they were required to report the "[g]ross amount of lay-off wagers accepted during month."

Under these circumstances, the jury could have found that the tavernkeepers were not independent bookies themselves liable for the tax, but rather that they were accepting bets for the defendants. See **United States v. Calamaro**, 354 U. S. 351, 356 (1957). Furthermore, we find no statutory language which would require the Government to prove that the tax allegedly due from the defendants was not paid by someone else. See 26 U. S. C., §§ 4401, 6419 (b) and 7201.

The defendants also contend that the Government failed to prove "wilfulness," "knowledge," or "intent" with respect to Counts I, III, IV and V of the indictment. Here again, defendants rely on the "independent bookie" theory, and that the amount of bets not reported constituted lay-off bets, which defendants in good faith thought they did not have to report. As heretofore stated, these were questions for the jury.[12] "The specific willful intent and bad motive required for conviction . . . is, of course, inherently

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[12] The evidence that defendants did not segregate lay-off bets in their own books or tax returns could be considered by the jury as showing willfulness or intent.

insusceptible of direct proof." **Lloyd v. United States**, 226 F. 2d 9, 14 (5th Cir. 1955).

Defendants' alternative argument, that any proof of willfulness applies only to Clancy, must likewise fail. Although it appears from the record that Clancy alone signed the tax returns and had charge of the books and records, it was also established that Prindable and Kastner were partners in the enterprise with a proprietary interest. The jury could reasonably find from all the evidence that the latter two also had the requisite intent. This case is not like the situation in **Ingram v. United States**, 360 U. S. 672 (1959), relied upon by defendants, where the court reversed the convictions of two relatively minor clerical functionaries at the headquarters of the operation.

Further, defendants contend as to Count V, that there was no evidence produced by the Government of an **agreement** to commit an offense against the United States. However, evidence of an express agreement is unnecessary. As this court stated in **United States v. Gordon**, 138 F. 2d 174 (7th Cir. 1943), at page 176:

> "[A conspiracy] is seldom capable of proof by direct testimony and may be inferred from the things actually done. It is enough if the minds of the parties meet and unite in an understanding way with the single design to accomplish a common purpose, which may be established by circumstantial evidence or by deduction from facts from which the natural inference arises that the overt acts were in furtherance of a common design, intent and purpose. . . . If the parties act together to accomplish something unlawful, a conspiracy is shown."

Here, the jury, considering all the evidence, could reasonably find that an unlawful conspiracy did exist. There is no reason for this court to upset the jury's finding. See **Pereira v. United States**, 347 U. S. 1, 12 (1954).

Defendants also argue that the trial court committed reversible error in failing to give certain instructions to the jury which they tendered, and in wrongfully instructing the jury as to the law of the case. We have examined the court's instructions and find them as a whole to be correct in law and fair to the defendants. The materiality of the false statements in Counts I and III of the indictment is a question for the court and not the jury. **United States v. Alu**, 246 F. 2d 29, 32 (2d Cir. 1957); **United States v. Parker**, 244 F. 2d 943, 950 (7th Cir. 1957), **cert. denied**, 355 U. S. 836.

True, defendants were entitled to instructions on their theory of the case for which there was any foundation in the evidence, even though they did not present any testimony. **United States v. Indian Trailer Corporation**, 226 F. 2d 595, 598 (7th Cir. 1955); **United States v. Phillips**, 217 F. 2d 435, 441 (7th Cir. 1954). However, they were not entitled to instructions "resting upon mere speculative assertions manufactured wholly from thin air." **United States v. Achilli**, 234 F. 2d 797, 808 (7th Cir. 1956), **cert. denied**, 352 U. S. 916, **vacated** 352 U. S. 1023, **affirmed** 353 U. S. 373, **rehearing denied** 354 U. S. 943.

A review of defendants' tendered instructions relied upon on appeal reveals that they are either partially incorrect in law (Instruction VIII), covered in substance by the court's instructions (Instruction XIX), not supported by the evidence (Instruction III), or abstract and irrelevant (Instruction IX). The court committed no reversible error in refusing to give such tendered instructions.

Finally, as respects the defendants' last major argument concerning alleged misconduct on the part of a juror, and the court's refusal to allow one of the attorneys for the defendants to testify regarding the same unless he withdrew from the case, we find no merit.

The disposition of a motion for new trial rests within the sound discretion of the trial judge, and his ruling on the motion is subject to review only for an abuse of judicial discretion. **United States v. Empire Packing Co.**, 174 F. 2d 16, 20 (7th Cir. 1949). Moreover, the integrity of the jury may not be assailed by mere suspicion and surmise, but it is presumed that the jury are true to their oath and conscientiously observe the instruction of the court. **United States v. Sorcey**, 151 F. 2d 899, 903 (7th Cir. 1945).

Although an attorney is competent to testify in his client's behalf, the court is then justified in excluding him from further participation in the trial. **Christensen v. United States**, 90 F. 2d 152, 155 (7th Cir. 1937). Here, the attorney refused to withdraw from the case; and we hold that under such circumstances, it was not an abuse of discretion for the court to refuse to hear his testimony.

The testimony of Mrs. Simmons was plainly insufficient to support defendants' allegations that a juror **who actually served** on the petit jury had answered falsely on voir dire examination and was prejudiced against gamblers.

Also, it is clear from the trial court's memorandum that defendants waived the objections to the qualifications of the petit juror which they press here. If a party obtains knowledge during the progress of a trial of misconduct on the part of a juror, he must object at once, or as soon as the opportunity is presented, or be considered as having waived his objection. See 89 C. J. S., Trial, § 483. Merely calling the matter to the attention of the court without any objection thereto is insufficient; and it is not incumbent upon the court to take action with respect thereto on its own volition. 89 C. J. S., Trial, § 484. The defendants knew of this matter during trial, but did not pursue it fully or make a motion of any kind. Under these circumstances, defendants waived any objection arising therefrom.

For the reasons herein set forth, we affirm the judgment of the district court.

Affirmed.

Schnackenberg, Circuit Judge, concurring.

The failure of the trial judge to require the production by the government of the memoranda prepared by certain government witnesses presents a difficult question on this appeal. However, I am not convinced that Judge Steckler's holding on that subject is wrong.

The language in the cases which he cites lends considerable support to his conclusion.

A true copy:

Teste:

Kenneth J. Carrick,
Clerk of the United States Court of
Appeals for the Seventh Circuit.

Seal

Judgment.

United States Court of Appeals
For the Seventh Circuit.
Chicago 10, Illinois.

Thursday, March 24, 1960.

Before
Hon. John S. Hastings, Chief Judge,
Hon. Elmer J. Schnackenberg, Circuit Judge,
Hon. William E. Steckler, District Judge.

United States of America, Plaintiff-Appellee, No. 12,815. vs. Thomas D. Claney, James F. Prindable and Donald Kastner, Defendants-Appellants.	Appeal from the United States District Court for the Eastern District of Illinois.

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Illinois, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be and the same is hereby Affirmed, in accordance with the opinion of this Court filed this day.